

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Mi Familia Vota, et al.,

Plaintiffs,

V.

Adrian Fontes, in his official capacity as
Arizona Secretary of State, et al.,
Defendants.

AND CONSOLIDATED CASES

Case No. 2:22-cv-00509-SRB
(Lead)

**PLAINTIFFS' MOTION TO STRIKE
UNTIMELY SUPPLEMENTAL
EXPERT REPORT AND RELATED
DATA, AND TO PARTIALLY
EXCLUDE TESTIMONY OF DR.
JESSE RICHMAN**

No. CV-22-00519-PHX-SRB
No. CV-22-01003-PHX-SRB
No. CV-22-01124-PHX-SRB
No. CV-22-01369-PHX-SRB
No. CV-22-01381-PHX-SRB
No. CV-22-01602-PHX-SRB
No. CV-22-01901-PHX-SRB

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1 Pursuant to Federal Rules of Civil Procedure 37 and 26(a), Plaintiffs file this motion
2 *in limine* to prevent Defendants from introducing an untimely, October 28, 2023
3 supplemental expert report from defense expert Professor Jesse Richman, based on an
4 untimely October 28, 2023 supplemental production of data from Defendant Arizona
5 Department of Transportation (“ADOT”). Although Professor Richman’s untimely
6 supplement is ostensibly a “correction” to assertions he made in his October 13, 2023
7 rebuttal report, it is in fact merely a last-minute effort to offer threadbare support to
8 speculative and baseless conclusions offered in his October 13 report. Both the
9 supplemental report and the original flawed analysis it tries to paper over fail multiple
10 standards of reliability and are inadmissible under Rule 702 and *Daubert v. Merrill Dow*
11 *Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Beyond the “corrected” analyses in his
12 untimely supplement, Professor Richman’s original report is riddled with basic statistical
13 and conceptual errors that warrant exclusion of significant aspects of his anticipated
14 testimony. Professor Richman’s October 30 deposition testimony confirmed the
15 unreliability of his analysis. Plaintiffs therefore move *in limine* to exclude the entirety of
16 his supplemental report and the following Sections of his October 13 report: Sections 1.3,
17 1.3.5, 1.3.5.1, 1.5.4, 1.6, 2.1.1, 2.3.1, 2.3.2, 2.3.2.1, 2.3.2.2, 2.2.2.3, 2.3.3, and 2.3.4,
18 including Tables 2, 2.3, 2.4, 2.5, 3-8 and 12-15.

19 This is not the first time Professor Richman has tried to present opinions based on
20 flawed methodology; nor is this the first time Professor Richman has violated the rules
21 requiring timely submission of expert opinions. Indeed, in Professor Richman’s only prior
22 court testimony, Judge Julie Robinson of the U.S. District Court for the District of Kansas
23 found that *every* analysis he presented (including two he is attempting to re-deploy in this
24 case) were methodologically “flawed” and entitled to “no weight,” and that Professor
25 Richman’s explanations for his untimely supplementation were “misleading” and
26 “disingenuous.” *See Fish v. Kobach*, 309 F. Supp. 3d 1048, 1085-1089, 1115-1116 (D.
27 Kansas 2018), *aff’d sub nom. Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020). Professor
28 Richman is once again impermissibly trying to belatedly amend “confusing, inconsistent,

1 and methodologically flawed" conclusions with "an untimely supplemental report." 309 F.
 2 Supp. 3d at 1092, 1115.

3 At this point in the proceeding, any effort by Defendants to have Professor Richman
 4 testify as to his untimely supplemental analysis would be prejudicial, as the supplemental
 5 report relies on incomplete data that ADOT (through the Defendant Attorney General)
 6 previously declined to produce to Plaintiffs' counsel. Moreover, the data produced
 7 continues to be incomplete, ADOT has not supplemented with data Plaintiffs requested,
 8 and Professor Richman's supplemental analysis is unreliable due to the lack of complete
 9 data, is clearly prejudicial to Plaintiffs, and should be excluded under Rule 37. Finally,
 10 because Professor Richman's opinions are based on unreliable methodology, he should be
 11 precluded from testifying as to the specified sections of his October 13 report.

12 Pursuant to Local Rule 7.2(l), Plaintiffs conferred with Defendant Attorney General
 13 and Intervenor-Defendants on November 2, 2023, and a follow up session on November 3,
 14 2023, during which Intervenor-Defendant RNC asked to have until 4 p.m. PST to consider
 15 the relief sought. That consideration is ongoing, but subject to that process, the Intervenor-
 16 Defendants and Defendant Attorney General oppose this motion. Consistent with the
 17 position it has taken on other matters, Plaintiffs understand the Defendant Secretary of
 18 State takes no position on this motion.

19 BACKGROUND

20 1. Pursuant to the Court's scheduling orders, written discovery was required to
 21 be completed on August 14, 2023, ECF No, 472; Rule 26(a)(2) expert disclosures were due
 22 on September 14, 2023, with rebuttal reports due October 13, 2023; and the joint pre-trial
 23 order (with Rule 26(a)(3) disclosures) due October 16, 2023. ECF Nos. 472, 485.
 24 Professor Richman served his report on October 13, a supplemental report at midnight on
 25 October 28, and was deposed on October 30.

26 2. Provisions challenged in this litigation require the Defendant Secretary of
 27 State to match the statewide registered voter file (Access Voter Information Database or
 28 "AVID") against the Defendant Arizona Department of Transportation's driver's license

1 database for non-citizenship status. A.R.S. § 16-165(G). Because of this, Plaintiffs
 2 propounded discovery requests to ADOT seeking “all information that is stored in the
 3 Driver License Database . . . including but not limited to” 15 separate categories of
 4 information. *See* Ex. 1, RFP No. 7. In response, ADOT objected to disclosure of the
 5 database under the Driver’s Privacy Protection Act. *Id.* *See also* Ex. 2 (objecting to
 6 providing access because it contains personally identifiable information). Ultimately, after
 7 seven weeks of negotiations during which ADOT continued to object to production, Ex. 3,
 8 and sixteen days before expert reports were due, ADOT produced a copy of portions of the
 9 limited data in its driver’s license database that it provides to the Secretary of State. This
 10 data extract included the MVD customer number, Arizona credential number, credential
 11 issuance date, and credential expiration date, and as well as a column that is sent to the
 12 Secretary of State reflecting whether or not ADOT’s information concerning authorized
 13 presence status reflects noncitizen documentation, but did not include any personally
 14 identifying information such as name, address or birthdate.

15 3. With this extract, Plaintiffs’ expert Dr. Michael McDonald compared the
 16 Arizona voter file against the produced ADOT drivers’ license file. Specifically, he
 17 matched AVID “full ballot voters” (who since 2005 have been required, under A.R.S. §
 18 16-166(F) to provide county recorders with “satisfactory evidence of United States
 19 citizenship” upon registering to vote) against the ADOT records. This analysis identified
 20 6,084 full-ballot voters whose driver’s license numbers still reflected a noncitizen status in
 21 the ADOT database. There are a number of reasons why individuals’ citizenship status
 22 could have been misclassified:

- 23 • *Matching error based on entry of wrong name, birthdate, or driver’s license*
 24 *number:* The ADOT data in the extract was all entered manually by ADOT customer
 25 service representatives. During testimony, ADOT provided an estimate that its
 26 review found that the data was entered accurately 85-89% of the time. Ex. 4
 27 (Jorgensen Tr. 190:20-191:2).
- 28 • *Data entry error in entering documentation source:* The extract ADOT produced

1 had a “non-citizen” field indicating citizenship status. This, in turn, was populated
2 through data entry from individual customer service representatives who recorded
3 the type of identification provided at the time the credential was issued by entering
4 a number between 1 and 6 into the database. If the ADOT customer service
5 representative made an error in entering the single-digit code, the individual’s
6 citizenship classification may be wrong.

- 7 • *Lag time:* Naturalizing citizens are not required to notify ADOT when they
8 naturalize as U.S. citizens. Accordingly, there can be a long lag time between when
9 someone naturalizes and when their ADOT record reflects their current citizenship
10 status. In many cases, this update will not occur until a renewal when authorized
11 presence documentation is once again verified. Additionally, there can also be a
12 shorter lag time between when the customer service representative sees
13 documentation of citizenship and when that is reflected in the driver’s license
14 database. If ADOT data is checked during the lag, it will inaccurately reflect non-
15 citizen status.
- 16 • *Credentials Issued Prior to October 1, 1996:* ADOT only systematically began
17 checking DPOC or “authorized presence” to be in the United States on October 1,
18 1996, upon ADOT’s implementation of rules to carry out a recently enacted law.
19 *See A.R.S. § 28-3153(D), as enacted by Ariz. Sess. Laws (1996), ch. 76 §§ 7, 134.*
20 This means that for driver’s licenses or state IDs issued prior to October 1, 1996,
21 there is no record of DPOC verification on file with ADOT and, therefore, no basis
22 to assess U.S. citizenship status. If the driver’s license or state ID holder has not
23 subsequently renewed their license or ID, they would have had no occasion to
24 present DPOC to ADOT at a later time. If ADOT checks one of these individual’s
25 statuses, it may inaccurately reflect their current citizenship status.
- 26 • *Licenses or state IDs issued prior to the effective date of the DPOC law in 2005:*
27 Proposition 200 (Arizona’s DPOC law) which was adopted in November 2004 and
28 took effect in 2005, expressly exempts from its requirements all individuals who

were already registered to vote on the effective date. A.R.S. § 16-166(G). Because such individuals were not required to provide DPOC, their ADOT information may not accurately reflect their current citizenship status.

- *Credential type:* While ADOT requires individuals obtaining or renewing a license to provide proof of authorized presence, including U.S. citizenship proof, many other interactions reflected in the ADOT database do not require such a check. In particular, when a non-citizen obtains a replacement non-REAL ID license or updates their non-REAL ID license (to reflect name or address change, turning 18 or for other reasons) ADOT does not require proof of authorized presence. Exs. 5, 6, 7, & 8.

11 4. On October 13, 2023, Professor Richman served a report in this case.
12 Professor Richman’s report presented approximately 20 quantitative analyses, many of
13 which (as discussed below) have significant methodological flaws that make them
14 unreliable. One central analysis of Professor Richman’s report is an ADOT/AVID
15 matching analysis – presented at Sections 1.3.5 and 2.3.1 and Tables 2 & 12 of his report.
16 In these analyses, Professor Richman claimed that there were 2,331 instances when license
17 was “established or renewed” where ADOT data indicated the license holder was a non-
18 citizen after they registered to vote. Professor Richman concluded that this was a
19 “reasonably strong indication” these full ballot voters were non-citizens when they
20 registered to vote, notwithstanding Arizona’s legal requirement for individuals to provide
21 DPOC to become full-ballot voters. Notably, Professor Richman’s analysis of the 2,331
22 likely non-citizens did not account for any of the potential errors above. Indeed, even
23 though full-ballot voters are required to provide DPOC as a matter of Arizona law, Dr
24 Richman assumes citizenship error in Arizona voter registration database but fails to even
25 consider, let alone exclude, the multiple possibilities for error in the ADOT data.

26 5. On October 12, 2023 – *i.e.*, two months after the written discovery cutoff and
27 *the very day before service of his October 13 report*, Professor Richman (through
28 Intervenor-Defendant RNC’s counsel) advised the Attorney General that he needed ADOT

1 to provide “some additional data in order to be certain of his position.” Ex. 9. Professor
 2 Richman asked for two things. First, Richman asked for the extract to be re-produced to
 3 “add a column indicating the type of credential issued . . . so that we can determine whether
 4 lawful presence documentation was shown at that time.” As an alternative, Richman
 5 proposed that ADOT “return historical data” for each of the “individuals at issue”—which,
 6 as Richman recognized, “would probably result in better data.”

7 6. On the evening of October 26, the Attorney General notified Plaintiffs that
 8 ADOT intended to make a supplemental data production pursuant to the RNC’s request,
 9 providing additional data fields reflecting the kind of credential issued. Ex. 10. On the
 10 morning of October 27, Plaintiffs’ counsel responded by asking for more information about
 11 why this information had not been previously provided in response to their own
 12 comprehensive requests for ADOT data. Plaintiffs further asked that, if ADOT was going
 13 to produce supplemental material, that additional points of data be included so that the data
 14 would be complete. Specifically, Plaintiffs asked ADOT to include any other data field
 15 indicating when proof of authorized presence was provided or reviewed, any other field
 16 that indicated the credential type, when the ADOT account was first established (*i.e.*,
 17 originally issued), and the individuals’ history. Ex. 11 & 12. That evening, ADOT made
 18 Eric Jorgensen available for a call to discuss the data that was being produced, and the
 19 additional data Plaintiffs requested; while Mr. Jorgensen advised that certain data Plaintiffs
 20 requested was not maintained in the database, he indicated that some information
 21 (including historical information) existed.

22 7. On the morning of October 28, ADOT made a supplemental production of
 23 data including the two data fields the RNC requested, but without the “better data” the
 24 RNC requested, and without including the data Plaintiffs requested to ensure the data was
 25 complete.

26 8. Without waiting to receive the “better data” he requested, just before
 27 midnight on October 28, Professor Richman served a supplemental report, supplementing
 28 his Tables 2 & 12. Correcting the credential point reduced the 2,337 voters in question to

1 1,376; Professor Richman then added an additional 403 people who were registered as full-
2 ballot voters on the same day they purportedly provided evidence of non-citizenship to
3 ADOT, raising his total to 1,779. Professor Richman’s analysis failed to address other
4 potential errors in the ADOT data match, such as data entry errors (of documentation type
5 or matching factors), lag time or license issuance prior to 1997, or whether these 1,779
6 registered *full-ballot* voters had registered before or after the DPOC law’s effective date in
7 2005, which in the latter case would be dispositive of U.S. citizenship status given the
8 documentary proof requirement they had to fulfill to obtain full ballot voter status.

9 9. At his deposition on October 30, Professor Richman confirmed that he did
10 not address any of the other potential errors in this analysis, and that he intends to present
11 testimony that the 1,779 people identified in his supplemental analysis are non-citizens.
12 Ex. 13 (Richman Tr. 304-307).

ARGUMENT

14 I. THE UNTIMELY SUPPLEMENTAL REPORT AND THE UNTIMELY
15 AND INCOMPLETE PRODUCTION OF DATA SHOULD BE EXCLUDED.

16 Under Rule 37, Defendants should be precluded from introducing any expert
17 analysis and data that was not timely disclosed. “Supplements relating to expert
18 disclosures must be made by the time disclosures under Rule 26(a)(3) are due.” *Western*
19 *Alliance Bank v. Jefferson*, 119 F. Supp. 3d 961, 966 (D. Ariz. 2015). Under Rule 37(c)(1)
20 and Ninth Circuit law, the exclusion of untimely disclosed expert testimony or materials is
21 “self-executing” and “automatic” and such should be excluded unless the untimely
22 disclosure was substantially justified or harmless. *See, e.g., Yeti By Molly Ltd. v. Deckers*
23 *Outdoor*, 259 F.3d 1101, 1106 (9th Cir. 2001) (affirming decision to exclude expert
24 testimony made on disclosure 28 days prior to trial). Similarly, Rule 37(c)(1) provides that
25 “if a party fails to provide information . . . the party is not allowed to use that information
26 . . . at a trial, unless the failure was substantially justified or is harmless.” It is the burden
27 of the party facing exclusion to show that the was either justified or harmless. *Yeti by*
28 *Molly*, 259 F.3d at 1107 (citing *Wilson v. Bradlees of New England, Inc.*, 250 F.3d 10, 21

1 (1st Cir. 2001).

2 To determine whether a failure to properly disclose evidence is "substantially
 3 justified or harmless, Courts consider the following factors, among others: (1) prejudice or
 4 surprise to the party against whom the evidence is offered; (2) the ability of that party to
 5 cure the prejudice; (3) the likelihood of disruption at trial; and (4) bad faith or willfulness
 6 involved in not timely disclosing the evidence." *Krause v. Cty. Of Mohave*, 459 F. Supp.
 7 3d 1258, 1270 (D. Ariz. 2020).

8 Here, both Professor Richman's supplemental disclosure and the data production
 9 that predicated it were untimely. Late disclosure was not substantially justified, and both
 10 are highly prejudicial.

11 1. With regard to the data, Plaintiffs requested that ADOT provide the full
 12 driver's license database pursuant to requests for production last summer. *See* Ex. 1 RFP
 13 No. 7. After Defendant ADOT objected on the grounds of data privacy and delayed
 14 production for many weeks, on August 29, 2023, ADOT produced a limited extract
 15 containing far less data than Plaintiffs had requested. That limited data extract was what
 16 both Plaintiff and Defendants' experts had available and relied upon in preparing their
 17 expert analyses – Dr. McDonald on September 14, and Professor Richman on October 13.

18 On October 12, 2023, a full seven weeks after the written discovery cutoff,
 19 Intervenor-RNC requested ADOT make a supplemental production. Ex. 9. This request
 20 was made through an informal back channel, not by propounding formal discovery that
 21 would have alerted Plaintiffs that the request had been made. Ex. 9. Notwithstanding
 22 Defendant ADOT's prior objection to production of this (and other data) in response to
 23 Plaintiffs' timely discovery requests, on October 28, 2023 – eight days before trial is
 24 scheduled to start in this matter, ADOT made a supplemental production to include
 25 additional data the RNC requested. Plaintiffs had no notice that this request had been made
 26 or that ADOT was willing to produce supplemental data until October 27. Upon being
 27 notified, Plaintiffs requested ADOT provide additional data fields, consistent with their
 28 previously served discovery requests, for the sake of completeness. But ADOT produced

1 the supplemental data the RNC requested without producing anything else the Plaintiffs
 2 requested.

3 This is a clear violation of Rule 37, and this data should be excluded. For starters,
 4 there is no justification, much less a substantial one, for the untimely production: After
 5 objecting to producing data when Plaintiffs requested it within the discovery period, ADOT
 6 produced a subset of that data pursuant to a request from a co-defendant well after
 7 discovery had closed and after Plaintiffs' experts had submitted their reports. Plaintiffs,
 8 having assumed that discovery was closed, relied on ADOT's earlier data production to
 9 prepare expert analysis, and were surprised (shocked, actually) to receive a notification
 10 from the Attorney General on the evening of October 26—two weeks *after* the rebuttal
 11 report deadline and on the Thursday evening before Professor Richman's Monday
 12 deposition—that ADOT would be making a supplemental production. Despite Plaintiffs'
 13 request, ADOT has not produced the full database or any of the supplemental data, severely
 14 prejudicing Plaintiffs' ability to respond to Professor Richman's untimely disclosures.
 15 Given the timing of this violation, and ADOT's resistance to producing additional data,
 16 this prejudice cannot be cured.

17 For reasons described in more detail below, this partial production of data is
 18 prejudicial because has allowed Professor Richman to continue to propound misleading
 19 and inaccurate analysis without providing Plaintiffs (or the Court) with the complete data
 20 that would facilitate demonstrating Professor Richman is misleading. Moreover, there is
 21 no substantial justification for the untimely production of this data; ADOT objected to the
 22 timely production of the data when Plaintiffs requested it, but waived that objection when
 23 the data was requested by a co-Defendant, outside the time when Plaintiffs could seek
 24 further discovery relief. That is not how the Rules of Civil Procedure work. ADOT's
 25 supplemental data production should be excluded for all purposes.

26 2. Professor Richman's supplemental report is also untimely. Rebuttal reports
 27 were due on October 13, 2023. ECF 472. Professor Richman did not even request the data
 28 he relies upon for the supplementation until October 12 – a single day before he submitted

1 his report, and a full month after he had been retained by Intervenor-Defendant RNC. His
 2 supplemental report was served late on the evening of October 28 – twelve days after Rule
 3 26(a)(3) disclosures were due and 34 hours before his deposition was scheduled to start.

4 While Rule 26(e)(2) contemplates an expert may supplement their disclosure, there
 5 is a firm deadline to do so: “th[e] information must be disclosed by the time the party’s
 6 pretrial disclosures under Rule 26(a)(3) are due.” Fed. R. Civ. P. 26(e). In this case, that
 7 deadline was October 16, 2023—twelve days before the supplement was served. Professor
 8 Richman’s supplement was clearly untimely.¹ The late disclosure is not substantially
 9 justified: Professor Richman did not even request the data he relies upon in his
 10 supplemental report until October 12, the day before his report was due, and even without
 11 this data was able to submit an 80-page, single-spaced, 258-paragraph report. To the extent
 12 this data was necessary to substantiate Professor Richman’s conclusions, he should have
 13 (i) requested the data well before his deadline, (ii) asked for discovery to be reopened, or
 14 (iii) declined to reach conclusions he could not be “certain” were supported by the data in
 15 his possession. He did none of these things.

16 The supplemental report is also highly prejudicial to Plaintiffs. In addition to the
 17 violation of the discovery rules, as discussed below, because Professor Richman updated
 18 his report based on incomplete information (which excluded the information Plaintiffs
 19 requested be added to the production on October 27), it is highly misleading. Moreover,
 20 there is no obvious cure to this untimely supplementation: because Professor Richman
 21 provided his supplement after Plaintiffs’ expert Dr. McDonald was deposed, after the Rule
 22 23(a)(3) deadline to supplement reports, and nine days before trial is to start, Dr. McDonald
 23 cannot serve a timely Rule 26(e) supplement to his report to identify the obvious errors in
 24 Professor Richman’s supplemental analysis. The supplemental report should be excluded

25
 26 ¹ Dr. McDonald provided a revised report and Declaration on October 11, five days before
 27 the supplementation deadline, and shortly before rebuttal reports were due. The report
 28 updated transcript citations (to reflect final transcripts), as well as the release of the Election
 Procedures Manual, and addressed a document produced by the Secretary of State on
 October 2, 2023 explaining its matching criteria.

1 in its entirety.

2 **II. PROFESSOR RICHMAN'S UNRELIABLE ANALYSIS SHOULD BE**
 3 **EXCLUDED UNDER RULE 702 AND DAUBERT.**

4 **A. Legal Standard**

5 Under Rule 702, expert testimony must meet five conditions to be admissible:

6 [a] witness who is qualified as an expert by knowledge, skill, experience,
 7 training or education may testify in the form of an opinion or otherwise if:
 8 (a) the expert's scientific, technical, or other specialized knowledge will
 9 help the trier of fact to understand the evidence or to determine a fact in
 10 issue; (b) the testimony is based on sufficient facts or data; (c) the testimony
 11 is the product of reliable principles and methods; and (d) the expert has
 12 reliably applied the principles and methods to the facts of the case.

13 Both the Supreme Court and the Ninth Circuit have been clear that this standard
 14 must be rigorously enforced, and that the party seeking to admit expert testimony bears the
 15 burden of establishing its admissibility. *Bldg. Indus. Ass'n of Washington v. Washington*
State Bldg. Code Council, 683 F.3d 1144, 1154 (9th Cir. 2012); *see also Daubert v. Merrell*
Dow Pharms., Inc., 509 U.S. 579, 592 n.10 (1993).

16 Under Rule 702, district courts play a “gatekeeping role,” responsible for ensuring
 17 that any expert testimony admitted “is not only relevant, but reliable.” *Daubert*, 509 U.S.
 18 at 597, 589; *see also United States v. Valencia-Lopez*, 971 F.3d 891, 897–98 (9th Cir.
 19 2020). While one of the “gatekeeper” role’s purposes of keeping unreliable testimony from
 20 reaching a jury is not present in a bench trial, “*Daubert*’s requirements of reliability and
 21 relevancy continue to apply in a bench trial,” *Metavante Corp. v. Emigrant Sav. Bank*, 619
 22 F.3d 748, 760 (7th Cir. 2010),² and district courts in the Ninth Circuit have applied the
 23 *Daubert* test in bench trials and do not hesitate to exclude unreliable experts. *See, e.g.*,
 24 *Jones v. United States*, 933 F. Supp. 894, 898 (N.D. Cal. 1996) (excluding testimony from
 25 two experts for failure to satisfy the *Daubert* standards); *Lo v. United States*, No. 2:17-cv-

27 ² *See also Att'y Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009)
 28 (similar); *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1302 (Fed. Cir. 2002)
 (similar).

1 012020TL, 2022 WL 1014902, *12 (W.D. Wash. April 5, 2022) (excluding portions of
 2 expert testimony ahead of a bench trial).

3 The gatekeeping function inherently requires the trial court to conduct an exacting
 4 analysis of the foundations of expert opinions to ensure they meet the standards for
 5 admissibility under Rule 702. *Grodzitsky v. American Honda Motor Co.*, 957 F.3d 979,
 6 984 (9th Cir. 2020) at 984 (“Under *Daubert*, the district court judge must ensure that all
 7 admitted expert testimony is both relevant and reliable.” (internal quotation marks
 8 omitted)).

9 The Ninth Circuit has recognized that the trial court’s “special obligation” to serve
 10 as the gatekeeper to “determine the relevance and reliability” is “vital to ensure accurate
 11 and unbiased decision-making by the trier of fact.” *Mukhtar v. Cal. State Univ.*, 299 F.3d
 12 1053, 1063 (9th Cir. 2002) (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147
 13 (1999). “The trial judge must make sure that ‘junk science’ plays no part in the decision.”
 14 *Id.* With respect to methodology, the *Daubert* inquiry considers “(1) whether the expert’s
 15 theory can be and has been tested; (2) whether the theory has been subjected to peer review
 16 and publication; (3) the known or potential rate of error of the particular scientific
 17 technique; and (4) whether the technique is generally accepted in the scientific
 18 community.” *Mukhtar*, 299 F.3d at 1064.

19 As shown below, Professor Richman’s testimony should be excluded for failing to
 20 meet several of the applicable requirements under these standards.

21 **B. Professor Richman’s Qualifications and Prior History as an Expert**

22 Under this Court’s “gatekeeper” function, the Court is charged with assessing
 23 whether Intervenor-Defendant RNC, as the party offering Professor Richman, has
 24 established the admissibility of his opinions. *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir.
 25 2007). In evaluating Professor Richman’s qualifications, the Court should be aware of two
 26 things:

27 First, while Professor Richman has published one peer-reviewed article estimating
 28 the alleged presence of non-citizens on the voter rolls, he has been widely criticized within

1 the field of political science for methodological errors in this work. For example, Professor
 2 Richman's main publication on this topic, the 2014 paper "Do Non-Citizens Vote in US
 3 Elections?" which was published in the British journal *Electoral Studies*,³ extrapolated,
 4 based on an internet public survey (the CCES) that a small number of respondents who
 5 identified themselves as non-citizens had voted in elections. Professor Richman's analysis
 6 was the subject of extensive and withering criticism. Dr. Stephen Ansolabehere—the
 7 creator and leader investigator of the CCES survey Professor Richman relied upon—
 8 published a peer-reviewed article in the same journal explaining the survey was not meant
 9 to measure non-citizens and that Professor Richman's conclusions were methodologically
 10 unsound.⁴ After Richman's flawed study was seized upon by President Trump in the wake
 11 of the 2016 election, over 200 political scientists signed a public letter stating that
 12 Richman's analysis "has been shown to be incorrect" and "generally rejected" by the
 13 "scholarly political science community." *See* Ex. 14. Among other deficiencies, Professor
 14 Richman failed to acknowledge "in a survey as large as the CCES, even a small rate of
 15 response error (where people incorrectly mark the wrong item on a survey) can lead to
 16 incorrect conclusions" and Richman based his findings "on a sample of 339 respondents .
 17 . . out of about 30,000 CCES respondents," many of whom provided inconsistent
 18 responses. Dr. Ansolabehere also testified in the *Fish* case, where the Court found that
 19 "Richman's *Electoral Studies* article concluding that millions of noncitizens registered and
 20 voted was credibly dismantled by Dr. Ansolabehere, the architect of the survey upon which
 21 Dr. Richman's conclusions were based." *Fish*, 309 F. Supp. 3d at 1108; *see also id.* at 1087
 22 (crediting testimony of Dr. Ansolabehere—the designer of the CCES survey—regarding
 23 the flaws in Professor Richman's analysis and observing "a group of approximately 200
 24 political scientists signed an open letter criticizing Richman's work on essentially the same
 25 grounds").

26
 27 ³ 26 *Electoral Studies* 149 (December 2014).

28 ⁴ S. Ansolabehere, et al., THE PERILS OF CHERRY PICKING LOW FREQUENCY EVENTS IN
 LARGE SAMPLE SURVEYS, 40 *Electoral Studies* 409-410 (December 2015).

1 Second, in the one matter where Professor Richman previously testified at trial, the
 2 district court, after hearing his testimony, concluded that *every* analysis he presented that
 3 estimated voter registration by non-citizens was “flawed,”
 4 “not statistically valid,” and entitled to “no weight.” *Fish*, 309 F. Supp. 3d at 1085-1089.
 5 Professor Richman’s *Fish* analyses included:

- 6 • analysis based on individuals who responded they were not citizens to the CCES
 7 survey. The *Fish* court found that Professor Richman (i) used a sample size too
 8 small to provide “reliable or probative statistical evidence,” (ii) failed to
 9 demonstrate that the [survey] respondents were in fact noncitizens, (iii) failed to
 10 account for “registration overreporting” where survey respondents respond that they
 11 are registered to vote when they are not, and (iv) failed to weight the CCES sample
 12 to reflect the population of Kansas. *See* 309 F. Supp. 3d at 1087. Notably, his *Fish*
 13 CCES analysis is similar to the analysis Professor Richman presents in Section
 14 2.3.2.3 and Table 14 of his October 13 report.
- 15 • analysis from Sedgwick County of naturalized citizens who were allegedly
 16 registered to vote at the time of naturalization. The *Fish* court found that (i)
 17 Professor Richman’s reported “margin of error” was significantly understated, and
 18 when properly calculated, was not statistically distinguishable from zero, and (ii)
 19 his Sedgwick County analysis was not based on a representative sample of non-
 20 citizens and was not weighted to reflect the non-citizen population. *Fish*, 309 F.
 21 Supp. 3d at 1088-91. Professor Richman confirmed at deposition he presents the
 22 same Sedgwick County analysis the *Fish* court rejected in Section 2.3.2.1 and Table
 23 13 of this October 13 report. Ex. 13 (Richman Tr. 257-258).

24 In this case, what is past is prologue. Professor Richman’s recycled conclusions—already
 25 found to lack credibility in an affirmed district court decision—and history of
 26 “disingenuous” explanations for untimely disclosure of his opinions raise serious doubts
 27 about his qualification “to testify competently” and the reliability of “the methodology by
 28 which” he “reaches his conclusions.” Fed R. Evid. 702.

C. Professor Richman's Supplementation Confirms His ADOT Methodology is Unreliable

Professor Richman’s analysis in this case is as unreliable as what he presented in *Fish*. In assessing reliability, a court “must scrutinize the proffered expert testimony in order to assure that the expert had sufficient data, used reliable scientific methods, and applied those methods in a reliable way . . . [and] be certain that an expert employs in the courtroom the same level of intellectual right that characterizes the practice of an expert in the relevant field.” *In re Countrywide Fin. Corp.*, 984 F. Supp. 2d 1021, 1026 (C.D. Cal. 2013) “[E]xpert opinions based on unsubstantiated generalizations or opinions not derived by the scientific method must be excluded.” *Krause*, 459 F. Supp. 3d at 1264.

Professor Richman’s analysis of ADOT data in Sections 1.3.5 and 2.3.1 and Tables 2 & 12 of his October 13, 2023 report fails at multiple levels – sufficiency of data, unreliable methods, and unreliable application of methods. Professor Richman concluded that there were 2,331 instances when a license was “established or renewed” where ADOT indicated they were a non-citizen after that individual registered to vote, attributing a “confidence interval” to this estimate of “0.50% to 0.54%.” But Professor Richman failed to consider and address the following reasons why the ADOT data might be wrong: data entry error regarding name, birthdate, or driver’s license numbers that causes a mismatch, data entry error regarding the type of documentation provided leading to misclassification as a non-citizen, failure to consider whether these *full-ballot* voters had registered prior to or after the DPOC law’s effective date in 2005 (the latter for which they were required to conclusively establish their U.S. citizenship), failure to exclude replacement and update transactions where authorized presence was not checked, and failure to account for lag time in updating ADOT’s records. Moreover, Richman’s confidence interval is based on assumptions regarding the share of non-citizens in Arizona, the denominator of which is based on survey data from the ACS. The survey data itself contains a range of error, which Richman does not account for in his Table.

Indeed, Professor Richman served his October 13 report *knowing* that his data was

1 insufficient and he needed “additional data in order to be certain” of the positions he was
 2 taking in Sections 1.3.5 and 2.3.1 and Tables 2 & 12 Ex. 9. In particular, he knew that he
 3 was not certain that his characterization of 2,331 “licenses established or renewed” could
 4 “include issuance that do not require proof of authorized presence.” *Id.*. And that
 5 deficiency was only the tip of the iceberg – he knew or should have known that the 2,331
 6 individuals issued these licenses might have been erroneously classified as “non-citizen”
 7 for a multitude of other reasons but did not even attempt, let alone exclude, these other
 8 possibilities. These sleights of hand are nothing new for Professor Richman. In *Fish*, he
 9 offered the opinion that roughly one percent of non-citizens in Sedgwick County, Kansas
 10 were registered to vote based on records purportedly showing that a small handful of
 11 naturalizing individuals were already registered to vote. *Fish*, 309 F. Supp. 3d at 1088-89.
 12 Professor Richman offered this testimony despite *admitting* at trial that he was aware that
 13 the naturalizing individuals may not have actually been registered to vote at all, and were
 14 in Kansas’s voter registration database for some other reason. *Id.*

15 The magnitude of Professor Richman’s error here is self-evident in his October 28,
 16 2023 supplemental report. Of the 2,331 allegedly noncitizens “licenses established or
 17 renewed after voter registration” that he previously found, 961 (41%) turned out not, in
 18 fact, to be “licenses established or renewed” at all; rather these were updates or duplicates
 19 where ADOT does not check for authorized presence. In other words, Professor Richman
 20 has acknowledged that his original number of alleged noncitizens was inflated by over
 21 forty percent. Another way of putting is that the ***actual error*** in Professor Richman’s
 22 estimate of “licenses established or renewed after voter registration” was ***82 times larger***
 23 ***than the 0.5% error he attributed to his estimate.***

24 Moreover, while Professor Richman purported to address this error in his October
 25 28, 2023 supplement, the supplement still did not address the various potential sources for
 26 misclassification, like data entry error (keystroke errors resulting in coding the wrong
 27 documentation shown by the ADOT customer, name or birthdate errors that prevent
 28 matching), lag time, or the lack of any mandate to notify or update ADOT data if a there is

1 a citizenship status change. Professor Richman also failed to establish that these
 2 individuals registered prior to the DPOC law's effective date in 2005—if they registered
 3 after the DPOC law took effect in 2005, their status as *full-ballot* voters would be a strong
 4 indication that they are U.S. citizens and had satisfied the DPOC requirement. These are
 5 all issues that could have been potentially ameliorated if ADOT had produced the “better”
 6 “historical data” that Professor Richman requested but ADOT did not provide. Professor
 7 Richman, nonetheless, went ahead and presented what was effectively an incomplete
 8 correction, knowingly based on incomplete data without disclosing that he still did not have
 9 the full set of data necessary to conclude that these individuals had registered to vote while
 10 non-citizens.

11 As will be shown below, Professor Richman's analysis concluding certain *full-*
 12 *ballot* voters lack U.S. citizenship failed to even consider whether these individuals
 13 registered prior to or after the DPOC law's 2005 effective date. If they registered after the
 14 DPOC law took effect, as a matter of law, their registration as *full-ballot* voters able to
 15 vote in all federal, state, and local elections would constitute a strong indication that they
 16 are U.S. citizens who had satisfied the DPOC requirement. By contrast, if they registered
 17 prior to the 2005 effective date, they would be expressly exempted from the DPOC law's
 18 requirements under the law's “safe harbor” provision. A.R.S. § 16-166(G). Registering as
 19 a *full-ballot voter* after that 2005 effective date tends to demonstrate U.S. citizenship. Dr
 20 Richman merely assumes error in Arizona's voter registration database and fails to even
 21 consider, let alone exclude, the strong possibility of error in the ADOT data. This is fatal
 22 to the reliability of his analysis.

23 And rather than address ADOT's lag time in updating its records, Professor
 24 Richman exacerbated this error, adding in 403 people not in his October 13, 2023 report
 25 who were registered to vote as full ballot voters “simultaneously” (Professor Richman's
 26 word) with their providing proof of authorized presence. Professor Richman does not seem
 27 to have grasped the absurd proposition that he is suggesting—that these individuals
 28 simultaneously presented ADOT with proof of citizenship (*i.e.*, the requirement to be

registered as full-ballot voters) and proof they were a *non*-citizen with authorized presence. Sensible explanations for these data errors raised by ADOT itself—a delay in ADOT’s processing the citizenship information, the accidental mistyping of a “3” or a “5” rather than a “4” by an ADOT customer service representative—are simply ignored by Richman. Instead, once again, Professor Richman merely assumes that the error lies in Arizona’s voter registration data and fails to consider, let alone exclude, the very real possibilities for error within the ADOT data. Because Professor Richman does not account for or address any of these possibilities, his analysis is fundamentally unreliable and should be excluded.

D. Numerous Other Analyses Professor Richman Intends to Present are Unreliable.

Numerous other analyses Richman presents are unreliable and should be excluded under *Daubert*.

1. *Richman's underestimation of ADOT Errors:* Consistent with his flawed analysis in Sections 1.3.5 and 2.3.1 and Tables 2 & 12, Professor Richman significantly understates the errors in the ADOT driver's license database. Relying on "one of the files" he was provided, in paragraphs 17 and 18 of his October 13 report, Professor Richman reports that there were only 22 instances where an error was corrected from "citizen to non-citizen" and that "this indicates a great deal of reliability in the coding of Authorized Presence Status by ADOT." But, aside from examining this one report, Professor Richman conducted no evaluation of the ADOT database, either to conclude that these 22 instances were the *only* instances of a non-citizen as citizen classification error. For starters, he did not conduct any analysis or evaluate why this report was either comprehensive or representative of the entire ADOT database. Nor did he conduct any further analysis that would allow him to conclude that there are no other errors that would impact the reliability of the ADOT database to allow identification of non-citizens. For example, he did not consider or attempt to quantify instances where a citizen is misclassified as a non-citizen, nor did he evaluate manual entry errors, typographical errors, name convention errors, or any other potential errors. In the *Fish* case, Judge Robinson repeatedly noted that Professor

1 Richman failed to demonstrate his analyses were “representative” of the populations he
 2 studied, and did not adequately account for classification errors. *Fish*, 309 F. Supp. 3d at
 3 1087, 1089, 1091, 1116. Having repeated the same types of errors here, Professor
 4 Richman’s analysis of the accuracy of the ADOT database in Paragraphs 17 and 18 is
 5 unreliable and should be excluded.

6 2. *Professor Richman’s “Geographic Distribution” Analyses:* In Sections
 7 1.3.5.1 and 1.5.4 and Tables 3 and 4 of his October 13 Report, Professor Richman purports
 8 to show correlations between the number of non-citizens in each of Arizona’s 15 counties
 9 and (i) the full ballot voters ADOT classified as non-citizens in that county (Table 3), and
 10 (ii) the number of federal-only ballot voters in that county (Table 4). In both cases, he
 11 asserts that this correlation confirms that these individuals are “in fact, non-citizens.”
 12 Richman Report ¶¶ 57, 106. Richman goes so far as to assert that “for every additional
 13 100 non-citizens in a county, an additional 3 individuals are on the federal only list.” *Id.*
 14 at ¶ 105.

15 There are a myriad of fundamental statistical errors in these analyses. For starters,
 16 Professor Richman’s analyses do not control for different types of population sizes: if there
 17 are more people, people of voting age, or registered voters in a particular county, it is
 18 reasonable to expect there will be more (i) non-citizens residing in that county, (ii) ADOT
 19 full voter matches, and (iii) federal-only voters. Professor Richman has failed to control
 20 for these potentially confounding variables.

21 Similarly, Professor Richman’s analysis compares these metrics among Arizona’s
 22 15 counties, and accordingly his statistical analyses are fundamentally based on fifteen
 23 observations about the relationship between presence of non-citizens in a county and the
 24 various voter rolls. There is typically an inverse relationship between the data set size and
 25 the strength of statistical conclusions that can be drawn. *See, e.g.*, Federal Judicial Center
 26 National Research Council, *Reference Manual on Scientific Evidence*, 318-19 (3d ed.
 27 2011). In both Table 3 and 4, Professor Richman attempts to mask this by ecologically
 28 inferring his 15 County-level observations to individuals within each county; by this sleight

1 of hand, known in social sciences as the “ecological fallacy,”⁵ he has transformed his study
 2 population of 15 counties into four million Arizona residents and dramatically understates
 3 his error rates.

4 Other fundamental methodological errors are clear when one compares the models
 5 used to generate Tables 3 and 4. Dr. Richman also mixes and matches different models to
 6 reach convenient conclusions.

	Table 3		Table 4 (w/o fixed effects)		Table 4 (w/ fixed effects)	
	Included in Model?	Reported on 10/13?	Included in Model?	Reported on 10/13?	Included in Model?	Reported on 10/13?
Proportion of population composed of non- citizens in county	Y	Y	Y	Y	Y	Y
Proportion of population composed of naturalized citizens in county	Y	Y	N	N	N	N
Constant	Y	N	Y	N	Y	N
County fixed effects (constant for each county)	N	N	N	N	Y	N

25 These inconsistencies are telling: they reflect that Professor Richman is changing his
 26

27 ⁵ See generally David A. Freedman, *Ecological Inference and the Ecological Fallacy*,
 28 Int'l Encyclopedia of the Soc. & Behav. Scis. Tech. Rep. No. 549.

1 analysis – adding and omitting variables – in the service of promoting a particular theory.
 2 While normally “failure to include variables will affect the [regression] analysis’
 3 probativeness, not its admissibility . . . some regressions [may be] so incomplete as to be
 4 inadmissible as irrelevant.” *Bazemore v. Friday*, 478 U.S. 385, at 400 & n.10 (1986). *See*
 5 *also Penk v. Oregon State Bd.*, 816 F.2d 458, 465 (9th Cir. 1987) (affirming district court
 6 decision excluding regression analysis where important “variables were either missing or
 7 inadequately represented”); *Bickerstaff v. Vassar College*, 196 F.3d 435, 449-450 (2d Cir.
 8 1999) (affirming trial court decision to give no weight to regression analysis that failed to
 9 account for major factors). Given the fundamental errors with this analysis, they fail the
 10 *Daubert* standard and should be excluded.

11 3. *Richman’s Presentation of CCES Survey Data*: Professor Richman presents
 12 several analyses in his October 13 report based on the CCES survey. Richman Rep.
 13 Sections 1.6, 2.1.1, 2.3.2.3, 2.3.3 & Tables 5-8 & 14. Survey evidence is admissible as an
 14 exception to the hearsay rule “if the survey is material, more probative on the issue than
 15 other evidence and if it has guarantees of trustworthiness.” *Brunswick Corp. v. Spinit Reel*
 16 Co., 832 F.2d 513, 522 (10th Cir. 1987). “The survey standards for reliability under
 17 *Daubert* and trustworthiness under the hearsay exception are parallel.” *Fish*, 309 F. Supp.
 18 3d at 1059. In this Circuit, a proponent of survey evidence must show, not only that the
 19 “survey was conducted in accordance with generally accepted survey principles” but also
 20 “that the results were used in a statistically correct measure.” *Keith v. Volpe*, 858 F.2d 467,
 21 480 (9th Cir. 1988).

22 Here, there is substantial reason to doubt that Professor Richman will present CCES
 23 results in a statistically correct manner. After all, his one peer-reviewed article interpreting
 24 CCES data was publicly criticized in an open letter signed by over 200 political scientists
 25 as “incorrect” and “generally rejected” by political scientists, who catalogued
 26 methodological problems with Professor Richman’s analysis. Ex. 14. Among the most
 27 prominent critics of Professor Richman’s CCES analysis are the principal investigators
 28 who designed and implemented the survey, who published a 2015 peer reviewed article

1 specifically called out Professor Richman for his methodology, “incorrect assum[ptions]”
 2 and misusing a survey that “was not designed to sample non-citizens.” S. Ansolobehere et
 3 al., *The Perils of Cherry Picking Low Frequency Events in Large Sample Surveys*, 40
 4 *Electoral Studies* 409-10 (Dec. 2015).

5 Judge Robinson also catalogued a myriad of problems with Richman’s CCES and
 6 other survey analysis in *Fish*, 309 F. Supp. 3d at 1087-88, many of which are repeated in
 7 the analysis he intends to repeat here. Many of the surveys he presents have very small
 8 sample sizes. *Compare* Richman Rep. at 30 tbl. 6 (drawing conclusions based on 201
 9 reported non-citizens out of 15,223 respondents) & tbl. 8 (drawing conclusions based on
 10 as few as 46 non-citizen responses) *with Fish*, 309 F. Supp. 3d at 1087 (“such small samples
 11 have large margins of error, and do not amount to reliable or probative statistical
 12 evidence”). As to the CCES analysis he intends to offer here, as in *Fish*, Professor Richman
 13 “failed to demonstrate that the [survey] respondents were in fact noncitizens” and “did not
 14 weigh the [survey] sample to accurately reflect the population of [Arizona].” *Id.*; *see also*
 15 Ex. 13 (Richman Tr. 295) (admitting he again did not confirm noncitizen of CCES
 16 respondents). And in Section 2.3.3 and Table 14, Professor Richman purports to present a
 17 new CCES methodology purportedly updated from his 2014 analysis; Professor Richman
 18 admitted in his deposition, however, that he has not submitted this new methodology to
 19 peer review. Ex. 13 (Richman Tr. 291).

20 Professor Richman’s CCES analysis is also not probative of issues in this case. Four
 21 of his analyses concern purported differences in citizen and non-citizen voter affiliations
 22 and preferences, particularly whether there were differences in political party affiliation or
 23 approval of particular candidates. Richman Rep. tbls. 5, 6, 7 & 8. But the survey data does
 24 not address whether non-citizens are actually registering to vote.

25 4. *Richman’s Presentation of Sedgwick County, Kansas Data:* In Section
 26 2.3.2.1 and Table 13 of his October 13 Report, Professor Richman presents the Sedgwick
 27 County data he presented in *Fish*. Judge Robinson found that (i) Richman had understated
 28 the margin of error in the analysis, (ii) failed to weight the sample, and (iii) did not confirm

1 that any of the individuals identified were, in fact, “noncitizens who had successfully
 2 registered to vote prior to naturalizing.” *Fish*, 309 F. Supp. 3d at 1089. At deposition,
 3 Professor Richman acknowledged he presented the same data, Ex. 13 (Richman Tr. 257-
 4 258), but in so doing, Professor Richman does not acknowledge the *Fish* findings, or state
 5 that or explain how he altered his analysis in light of those findings. In other words, he
 6 has done nothing to show why Judge Robinson’s conclusion was flawed and entitled to
 7 “no weight.” *Fish*, 309 F. Supp. 3d at 1089.

8 CONCLUSION

9 For the reasons stated herein, the Court should strike Professor Richman’s untimely
 10 October 28 supplemental report and bar any testimony or evidence based on that or the
 11 October 28 untimely ADOT production. Moreover, the Court should exclude any
 12 testimony from Professor Richman concerning testifying as to anything in his supplemental
 13 expert report, as well as the analyses in Sections 1.2.4, 1.3, 1.3.5, 1.3.5.1, 1.5.4, 1.6, 2.1.1,
 14 2.3.1, 2.3.2, 2.3.2.1, 2.3.2.2, 2.2.2.3, 2.3.3, and 2.3.4, including Tables 2, 2.3, 2.4., 2.5, 3-
 15 8 and 12-15.

16 Respectfully submitted,

17
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CERTIFICATE OF CONFERENCE

Pursuant to Local Rule 7.2(l), I hereby certify that Plaintiffs' counsel conferred with Defendant Attorney General and Intervenor-Defendants on November 2, 2023 and November 3, 2023 regarding this motion, and understand Defendants oppose this motion. I also understand the Defendant Secretary of State takes no position on this motion.

Dated: November 3, 2023

/s/ John A. Freedman
John A. Freedman

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2023, I served the foregoing
**PLAINTIFFS' MOTION TO STRIKE UNTIMELY SUPPLEMENTAL
EXPERT REPORT, RELATED DATA, AND TO PARTIALLY EXCLUDE
TESTIMONY OF DR. JESSE RICHMAN** on counsel of record for all parties
by filing on ECF.

Dated: November 3, 2023

/s/ John A. Freedman
John A. Freedman